UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN COOK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	11 Civ. 8624 (BSJ)
	)	
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,	)	ECF CASE
	)	
	)	
Defendant.	)	

MEMORANDUM OF LAW OF DEFENDANT UNITED STATES NATIONAL ARCHIVES AND RECORDS ADMINISTRATION IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

PREET BHARARA
United States Attorney for
the Southern District of New York
86 Chambers Street
New York, New York 10007
Tel: [redacted]
Fax: [redacted]
[redacted]@usdoj.gov

DAVID S. JONES
Assistant United States Attorney
– Of Counsel –

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases ***Page***

Statutes, Rules & Regulations

Congressional Reports and Hearings

Miscellaneous

Defendant the United States National Archives and Records Administration ("NARA" or the "Government") respectfully submits this memorandum in support of its motion for summary judgment in the above-referenced action, which was brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

PRELIMINARY STATEMENT

Pursuant to both longstanding NARA practice and well-recognized professional norms, archivists and librarians do not publicly disclose information about who seeks or obtains what information from their collections. This is so because researchers' specific requests and the subjects about which they inquire are considered sensitive personal information whose dissemination would violate important privacy interests, and could chill and impede the free marketplace of ideas.

Those well-established privacy principles govern the outcome of this FOIA case, which seeks to compel NARA to disclose the research inquiries of former President George W. Bush and former Vice President Richard Cheney, and their representatives. Specifically, this lawsuit was filed by plaintiff John Cook, a journalist affiliated with Gawker Media, seeking release under FOIA of all requests made by George W. Bush and Richard Cheney (the "former officials"), after they left office as President and Vice President respectively, for access to presidential and vice presidential papers from their administration. By statute, these records were transferred to NARA when the former officials left office, and the former officials, although statutorily entitled to unlimited access to their presidential or vice presidential records, must submit requests to NARA to obtain access to those records. Plaintiff also seeks NARA's responses to the former officials' requests for records.

NARA determined that, consistent with its usual practice, Cook's FOIA request should be denied as unreasonably violating the former officials' substantial privacy interests against the

involuntary broadcasting of the subject matters of their inquiries. If anything, these considerations apply with added force in the case of the former officials, because historically their records were considered their personal property until the 1970s when Congress statutorily deemed them federal property, and because Congress simultaneously chose to limit public access for a five-year period while giving the former officials an unlimited right of direct access to all their records, in order to facilitate and encourage their private research and the preparation of memoirs. The Court should reject Cook's claim that personal privacy interests do not justify withholding information about what the former officials have chosen to read and consider, and should instead grant summary judgment in favor of NARA.

STATEMENT OF FACTS[1]

A. The National Archives and Its Maintenance of Presidential Records

The National Archives and Records Administration was created by Congress in 1934, and is the depository of the permanently valuable historical records and documents of the Federal Government of the United States of America. *See* Mills Decl. ¶ 6. NARA's mission is to

[1] Facts stated herein are drawn from the Complaint, the Declarations of Thomas E. Mills ("Mills Decl.") and Emily Robison ("Robison Decl.") filed in support of NARA's motion, and, where indicated, from other publicly available sources that are properly subject to judicial notice.

The Government has not submitted a Statement Pursuant to Local Civil Rule 56.1. *See NAACP Legal Def. & Educ. Fund, Inc. v. HUD,* No. 07 Civ. 3378 (GEL), 2007 WL 4233008, at *1 n.1 (S.D.N.Y. Nov. 30, 2007) (finding strict compliance with Rule 56.1 unnecessary in FOIA case where "none of the relevant facts of the case are in dispute," and case "involve[s] purely legal inquiries, and resolution of those inquiries is not contingent on resolution of any factual disputes"); *see also Ferguson v. FBI,* No. 89 Civ. 5071 (RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995) (noting that submission of statement under former Local Rule 3(g) would be "meaningless," and that "the general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment") (citing *Carney v. DOJ,* 19 F.3d 807, 812 (2d Cir. 1994)), *aff'd,* 83 F.3d 41 (2d Cir. 1996). If the Court nevertheless informs the parties that it wishes the Government to submit a Rule 56.1 Statement in support of its motion, the Government will do so promptly.

"serv[e] American democracy by safeguarding and preserving the records of our Government, ensuring that the people can discover, use, and learn from this documentary heritage." Mills Decl. ¶ 8.

B. NARA's Maintenance of Presidential Records and Restrictions on Disclosure

Among NARA's statutory responsibilities is holding presidential records and materials from administrations that are no longer in office. *See generally* Presidential Libraries Act of 1955, 44 U.S.C. § 2112; Presidential Records Act of 1978 ("PRA"), 44 U.S.C. §§ 2201 *et seq*. Prior to the adoption of the PRA in 1978, presidential papers were considered the personal property of each President when that President left office. *See Nixon v. United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992) ("History, custom, and usage . . . indicate unequivocally that presidential papers have been treated as the President's private property."); *Folsom v. Marsh*, 9 F.Cas. 342, 345 (C.C.D. Mass.1841) (Story, Circuit J.) (discussing President Washington's papers and stating "it is most manifest, that President Washington deemed them his own private property"). Prior to enactment of the PRA, Presidents often had deposited their papers in presidential libraries, but their papers were theirs to do with as they saw fit, and there was no legal requirement that such papers be maintained in a public facility or made available to the public at all. *See Nixon*, 978 F.2d at 1287-98 (describing what each President chose to do with his presidential papers).

In response to certain controversies regarding President Nixon's papers (which prompted the Presidential Recordings and Materials Preservation Act of 1974 ("PRMPA"), *see* note following 44 U.S.C. § 2111), Congress passed the PRA in 1978. The PRA prospectively abolished the tradition of private ownership of presidential records, 44 U.S.C. § 2202, and also set forth a scheme for the preservation and disclosure of presidential and vice presidential records. *See* 44 U.S.C. §§ 2201, 2207; *see generally* Robison Decl. ¶¶ 8-13. "Presidential

records" covered by the PRA include "documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory or other official or ceremonial duties of the President." *Id.* § 2201(2), Robison Decl. ¶ 8. Equivalent records of the former Vice President are also governed by the PRA, pursuant to 44 U.S.C. § 2207. *See* Robison Decl. ¶ 10.

Under the PRA, presidential records become the property of the United States at the end of the relevant president's term, 44 U.S.C. § 2202, and may be disclosed to the public under limitations imposed by the PRA. *Id.,* § 2204; Robison Decl. ¶ 9. The PRA imposes upon the Archivist of the United States ("Archivist") "an affirmative duty to make [presidential] records available to the public as rapidly and completely as possible consistent" with limitations under the PRA. *Id.* § 2203(f)(1). Generally, however, there is no public access to presidential records, under FOIA or otherwise, for a period of five years after the President leaves office, and the President may, before leaving office, "specify durations, not to exceed 12 years, for which access shall be restricted with respect to information" within one of six enumerated categories. *Id.,* § 2204(a)(1)-(a)(6); Robison Decl. ¶ 9. Because former President George W. Bush and former Vice President Cheney left office only in early 2009, all presidential records that NARA possesses from their administration remain subject to the PRA's five-year restricted period.

C. Former Officials' Right to Access Their Records, and Privacy Protections Afforded Their "Special Access Requests"

The PRA further provides that certain "exceptions to restricted access" exist, allowing for what are called "special access" requests from designated individuals. 44 U.S.C. § 2205; Robison Decl. ¶¶ 10, 15. As set out in section 2205(3), "the Presidential records of a former

President shall be available to such former President or his designated representative." *Id.* By application of section 2207 of the PRA, section 2205(3) also applies to vice presidential records, allowing for access to the former Vice President or his designated representative. *Id.*

To obtain access to the materials, the former officials or their designated representatives must submit a "special access request" for whatever it is that they wish to obtain or access. 44 U.S.C. § 2205(3), Robison Decl. ¶ 15. Such requests reveal the identity of the requester and the substance of what the requester seeks. *Id.* ¶ 16. NARA maintains records of special access requests in a Privacy Act-protected system of records. *Id.* ¶ 17; *see* 5 U.S.C. §552a. Based on longstanding, frequent interaction with former officials and their representatives, NARA understands that the designated representatives of the former officials "universally expect NARA staff to treat special access requests as having been made in confidence," to such an extent that a violation of this expectation would "cause serious harm to the ongoing relationship of trust that NARA staff enjoy in working with former Presidents and their representatives." Robison Decl. ¶ 20. Moreover, quite apart from the unique considerations posed by NARA's relationship with former presidents and vice presidents and their representatives, NARA considers the special access requests that it receives also to be governed by broadly-applicable privacy protections afforded any researchers who use NARA facilities. *Id.* ¶ 21.

D. Public Access to NARA Materials and Related Generally-Applicable Privacy Protections That Also Apply to Special Access Requests

Subject to certain restrictions, including the PRA's limits on public access to presidential records, the National Archives is open to the public, researchers, and other persons and agencies that have an interest in examining documents and materials held by the Archives. *See* Mills Decl. ¶ 8. A member of the public who wishes to review documents in person must register as a researcher with NARA and abide by the terms of conduct set forth in NARA's building

regulations. *Id.*; *see* 36 C.F.R. §§ 1254 *et seq.*; 1280 *et seq*. To register as a researcher, an individual must provide photo identification and proof of current address; each researcher then is assigned a researcher card and number. Mills Decl. ¶ 10. NARA maintains records of the researcher applications, organized by researcher name, in a system of records that is governed by the Privacy Act. *See* Mills Decl. ¶ 10. Similarly, when researchers seek access to records held by the National Archives, they must submit a "reference service request" requesting specific materials; as with the researcher registrations, NARA maintains records of all requests submitted by researcher name, in a system of records that is governed by the same Privacy Act system of records notice, "NARA 2," that applies to special access requests. *Id.* ¶ 11; Robison Decl. ¶ 17. NARA's policy and practice is not to publicly release requests for information, whether from former officials or from other researchers, unless required by law. Robison Decl. ¶¶ 20-21.

NARA considers both special access requests from the former officials and their designated representatives, and reference service requests from all other researchers, to raise serious privacy concerns whose protection is central to all National Archives users' freedoms to think, to gather information, and to develop ideas and participate in public discourse. *See generally id.* ¶¶ 20-23. NARA's experience and understanding is that former presidents and vice presidents (and their representatives) consider their inquiries to NARA to be private, as do other researchers, and both the former officials and other researchers could be chilled from making such inquiries if their requests or the subject matter of responses they receive could be made public to anyone who saw fit to file a FOIA request. *Id.*

E. Cook's FOIA Request

By letter dated October 21, 2010 (Exhibit 1 to the Complaint), Cook sent NARA a FOIA request seeking "copies of all requests for access to records received by the George W. Bush

Presidential Library since February 1, 2009," and related "subsequent correspondence," "with the exclusion of records governed by the Presidential Records Act." Compl. Ex. 1.[2] In the same request, Cook also sought "copies of all requests for access to the records of former Vice President Dick Cheney received by NARA staff since February 1, 2009." *Id.* Finally, Cook sought "any agreements or memoranda of understanding between the George W. Bush Presidential Library and" a variety of categories of persons "governing current or future access to records maintained by the Library." *Id.*

F. NARA's Response to the FOIA Request

By letter dated December 1, 2010 (Comp. Ex. 2), NARA informed Cook that "The National Archives fully protects the privacy of our researchers. Therefore, these records are withheld in full pursuant to 5 U.S.C. § 552(b)(6), the disclosure of which would constitute an unwarranted invasion of personal privacy." Compl. Ex. 2 at 1. NARA further informed Cook that "a thorough search of our records" did not reveal "records pertaining to" his request for agreements or memoranda of understanding concerning access to Library records. *Id.* at 2.[3]

G. Cook's Administrative Appeal

Cook appealed from NARA's determination by letter dated January 3, 2011 (Compl. Ex. 3), arguing that "[u]nder no conceivable circumstances could correspondence and other records concerning such requests be considered personal or private in nature." *Id.* at 1. NARA informed

[2] NARA opens what it calls a "case file" for each special access request it receives. Robison Decl. ¶ 16. Having reviewed its records in light of the narrowing of plaintiff's FOIA request set forth in the case management order approved by the Court on March 23, 2012, NARA has indentified on the order of 968 responsive special access requests. *Id.* ¶ 19.

[3] NARA did release copies of prior FOIA requests for President George W. Bush's records and Vice President Richard Cheney's records. Robison Decl. ¶ 6.

Cook by letter dated February 23, 2011 that his appeal was still being considered, that NARA then believed that there were approximately 7,500 pages of potentially responsive materials, and that NARA required additional time to complete necessary work on the appeal, in part because of the "need to coordinate with two [NARA] components." Compl. Ex. 4. Then, by letter dated June 3, 2011, NARA affirmed its initial determination as to "special access requests made by representatives of a former president or vice president," while noting that NARA believed there were as many as approximately 10,000 pages of potentially responsive documents. Compl. Ex. 5 at 1-2. NARA did, however, determine that Cook was "entitled to have NARA staff further process" documents relating to requests submitted by others, such as "the judiciary system, the incumbent President, or Congress." *Id.* at 3. NARA further informed Cook that he could "choose to deem this an interim response," or, "to the extent that your FOIA appeal has been denied in part," stated that Cook had "the right to seek judicial review in the United States District Court in which you reside or do business…." *Id.*

H. The Current Litigation

Cook commenced this action on November 29, 2011. His Complaint set forth the history of his FOIA requests and NARA's responses, and contended that NARA unlawfully withheld records of designated representatives' requests for access under FOIA Exemption 6 ("Count 1," Compl. at 8), and that NARA failed to promptly make available requests by "other officials" (*i.e.*, not the former officials) for information. *Id.* at 9 ("Count 2"). The Complaint requested relief, including a declaration that records requests by both the former officials' designated representatives and "other officials" are "public under 5 U.S.C. § 552 and must be disclosed"; an order requiring prompt production of those records; and costs and fees, along with other unspecified relief. *Id.* at 11.

NARA timely answered the complaint on January 20, 2012, denying that it had wrongfully withheld records. The answer noted that NARA had now determined that it possesses fewer than the 10,000 pages of potentially responsive records it previously had estimated. *See* Answer ¶ 29.

The parties then met in an attempt to narrow the issues presented and to agree on an efficient case management procedure. By stipulation approved by the Court on March 23, 2012 (Dkt. No. 6), the parties agreed that Cook's FOIA request for purposes of this litigation would be narrowed to apply solely to requests to NARA by the former officials and their designated representatives, as well as to NARA's responses to such persons. *See* Stip. at ¶ 5. Thus, the case no longer concerns requests by other officials, including the incumbent administration, Congress and the courts; nor does it concern requests submitted by or on behalf of members of the general public. *Id.* The parties further agreed that NARA need not process or produce internal NARA-generated processing documents, as opposed to actual special access requests by, and NARA responses to, the former officials or their representatives. *Id.* at ¶ 6.

The parties further agreed, and the Court has approved, the following case management procedure. NARA is now moving for summary judgment solely based on FOIA exemptions that it believes categorically apply to all documents now at issue in the case. *Id.* at ¶ 1. If that motion is denied in whole or in part, NARA will be entitled to file a second motion to assert any applicable FOIA exemptions on a non-categorical basis. *Id.* at ¶ 2.

ARGUMENT

THE FORMER OFFICIALS HAVE A PROTECTED PRIVACY INTEREST THAT RENDERS THEIR REQUESTS TO NARA FOR RECORDS FROM THEIR TIME IN OFFICE EXEMPT FROM DISCLOSURE UNDER FOIA

A. Applicable FOIA and Summary Judgment Standards

FOIA was enacted to "ensure an informed citizenry . . . . needed to check

against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978). FOIA requires each federal agency to make available to the public a wide array of information, and sets forth procedures by which requesters may obtain such information. *See* 5 U.S.C. § 552(a).

At the same time, FOIA exempts nine categories of information from disclosure. *See* 5 U.S.C. § 552(b). In accordance with FOIA's "goal of broad disclosure, these exemptions have been consistently given a narrow compass." *Dep't of the Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8 (2001) (citation and internal quotation marks omitted). Nevertheless, the FOIA exemptions "are intended to have meaningful reach and application." *John Doe Agency v. John Doe Corp.,* 493 U.S. 146, 152 (1989). Congress recognized "that public disclosure is not always in the public interest," *CIA v. Sims,* 471 U.S. 159, 166-67 (1985), and "FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential," *Center for Nat'l Sec. Studies v. DOJ,* 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency,* 493 U.S. at 152).

This Court reviews an agency's assertion of a FOIA exemption *de novo*. *See* 5 U.S.C. § 552(a)(4)(B); *Halpern v. FBI,* 181 F.3d 279, 287 (2d Cir. 1999). Most FOIA actions are resolved on motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., Miscavige v. IRS,* 2 F.3d 366, 369 (11th Cir. 1993) ("Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified."); *Jones-Edwards v. Appeal Bd. of Nat'l Sec. Agency,* 352 F. Supp. 2d 420, 423 (S.D.N.Y. 2005) ("Summary judgment is the procedural vehicle by which most FOIA actions are resolved."). "In order to prevail on a motion for summary judgment in a FOIA case,

the defendant agency has the burden of showing that . . . any withheld documents fall within an exemption to the FOIA." *Carney,* 19 F.3d at 812.

"Affidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Id.* (footnote omitted); *see also Halpern,* 181 F.3d at 291 (same). The declarations submitted by the agency in support of its determination are "accorded a presumption of good faith." *Wilner v. Nat'l Sec. Agency,* 592 F.3d 60, 69 (2d Cir. 2009) (citation and internal quotation marks omitted).

B. FOIA Exemption 6

Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The purpose of the exemption is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *U.S. Dep't of State v. Washington Post Co.,* 456 U.S. 595, 599 (1982).

Assuming that the information at issue qualifies as a "personnel," "medical," or "similar" file under Exemption 6, the Court must determine whether the individual to whom the information applies has a substantial privacy interest in the information. *See Associated Press v. U.S. Dep't of Defense,* 554 F.3d 274, 291-92 (2d Cir. 2009). If a substantial privacy interest exists, the Court next balances that interest against any public interest in disclosure of the information. *See id*. If the substantial privacy interest outweighs the public interest, the information should be withheld under Exemption 6. *See, e.g., News-Press v. U.S. Dep't of Homeland Security,* 489 F.3d 1173, 1205 (11th Cir. 2007).

C. The Former Officials' Special Access Requests Meet the Threshold "Similar Files" Requirement of Exemption 6

As a required threshold matter, the records at issue here fall within the ambit of

"personnel and medical files and similar files" that are eligible for protection under Exemption 6. 5 U.S.C. § 552(b)(6). The term "similar files" is interpreted broadly, and all information that "applies to a particular individual" meets this threshold requirement for Exemption 6 protection. *Washington Post Co.,* 456 U.S. at 602; *Associated Press,* 554 F.3d at 291 ("The phrase 'similar files' has a broad meaning and encompasses the government's records on an individual which can be identified as applying to that individual."). The former officials' special access requests and NARA's responses clearly meet this requirement. NARA maintains records of all special access requests in a form that discloses both the identity of the requester, and the substance of each request. Robison Decl. ¶ 16. This information thus "can be identified as applying," *Associated Press*, 554 F.3d at 291, to the individual whose privacy interest is at stake; in fact, NARA classifies these records as Privacy Act-protected. *Id.* ¶ 17. The special access requests and responses therefore qualify as a "similar file" for purposes of Exemption 6.

D. The Former Officials Have a Substantial Privacy Interest in What Materials They Request From NARA

All special access requests submitted by the former officials (and their designated representatives), as well as NARA's corresponding responses to each such request, more than meet the second requirement of Exemption 6, namely, that the affected persons have a substantial privacy interest in preventing disclosure of the documents sought by plaintiff. *See Associated Press,* 554 F.3d at 291-92. As detailed below, the former officials and their representatives have a very great "privacy interest" in not having the subjects about which they think and gather information being involuntarily broadcast to the general public. This interest would be powerful in the case of any researcher, and is further strengthened by the fact that, for most of this nation's history, these papers would have been the personal property of the former officials and this type of case could not have arisen. NARA possesses these records solely as a

result of legislation enacted in 1978, and the legislative history and provisions of that very legislation make clear Congress's intent to protect the personal privacy and First Amendment rights of former Presidents and Vice Presidents. Nothing about the PRA or its history supports eliminating former officials' ability to consult records from their time in office without public scrutiny.

In general under FOIA Exemption 6, as the Supreme Court has stressed, "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *DOJ v. Reporters Comm.,* 489 U.S. 749, 763 (1989). Further, the privacy interest in Exemption 6 "belongs to the individual, not the agency." *Amuso v. DOJ,* 600 F. Supp. 2d 78, 93 (D.D.C. 2009) (citing *Reporters Comm.,* 489 U.S. at 763-65, and *Nat'l Ass'n of Retired Fed. Employees v. Horner,* 879 F.2d 873, 875 (D.C. Cir. 1989)). The Government bears the burden of demonstrating the existence of a substantial privacy interest. *Sims v. CIA,* 642 F.2d 562, 573 (D.C. Cir. 1980).

"The privacy interests protected by the exemptions to FOIA are broadly construed." *Associated Press v. DOJ,* 549 F.3d 62, 65 (2d Cir. 2008) (per curiam) (citing *Reporters Comm.,* 489 U.S. at 763). They reflect Congress' intent "to afford broad protection against the release of information about individual citizens." *Hopkins v. HUD,* 929 F.2d 81, 86 (2d Cir. 1991). Accordingly, a substantial privacy interest simply is one that is more than *de minimis*. *See Associated Press,* 554 F.3d at 285 ("Thus, 'once a more than *de minimis* privacy interest is implicated the competing interests at stake must be balanced in order to decide whether disclosure is permitted under FOIA.'") (citing *FLRA v. U.S. Dep't of Veterans Affairs,* 958 F.2d 503, 510 (2d Cir. 1992)); *FLRA,* 958 F.2d at 510 ("FOIA requires only a measurable interest in privacy to trigger the application of the disclosure balancing tests.").

Here, the former officials expect that their special access requests constitute private, personal information that is not to be disclosed. *See* Robison Decl. ¶ 20. Disclosure of the former officials' requests would reveal personal and private information in a variety of ways, all intrusive and substantial. For example, revealing even the mere frequency with which the former officials and their representatives consult records from their time in office could publicize the nature of their private intellectual pursuits, the methodology and thoroughness of their preparation of any memoirs, and the degree or extent of research they may have conducted in connection with any public statements that they may have made. Moreover, revealing the former officials' requests and NARA's responses would necessarily reveal the substance of their inquiries, *see* Robison Decl. ¶ 16, and, so, would disclose how they choose to go about their private thought processes. These types of disclosures invade long-recognized privacy interests that are central to all individuals' ability to use an archives or library in order to freely develop and express their thoughts.

Indeed, the relevant privacy interest here – an individual's privacy interest in the content of his research or inquiries – is long-established and well-recognized both by the courts, and within the archivist and librarian professions. Justice Douglas observed nearly 60 years ago that, "[w]hen the light of publicity may reach any student, any teacher, inquiry will be discouraged." *United States v. Rumely*, 345 U.S. 41, 57 (1953) (Douglas, J., concurring). Motivated by this same concern, the Society of American Archivists' Code of Ethics includes a "Privacy" tenet, which states, "[a]rchivists respect all users' rights to privacy by maintaining the confidentiality of their research and protecting any personal information collected about the users in accordance

with their institutions' policies."[4] Similarly, the American Library Association ("ALA") defines the right to privacy in a library as "the right to open inquiry without having the subject of one's interest examined or scrutinized by others." The ALA holds as an important standard the privacy of researchers in "respect to information sought or received and resources consulted, borrowed, acquired or transmitted." In support of this standard, the Council of the ALA in 2006 issued a "Resolution on the Retention of Library Usage Records" urging all libraries to adopt policies that would recognize the right of confidentiality of library users and protect their privacy and personal information.

The universality of these privacy principles is further highlighted by the fact that forty-eight states and the District of Columbia have statutes that protect the privacy of library circulation records. A list of these statutes appears on the ALA website, at http://www.ala.org/offices/oif/ifgroups/stateifcchairs/stateifcinaction/stateprivacy (last visited March 20, 2012). The two states that do not have laws, Hawaii and Kentucky, both have Attorney General opinions finding that library records are confidential and are not to be disclosed under open records laws. *Id.* These laws protect the confidentiality of circulation and other library records to varying degrees, but all recognize the privacy interest of individuals who seek information from a public library. Indeed, the Kentucky Attorney General Opinion states

[4] Authorities quoted or referred to in this paragraph are as follows, and are available at the following websites: (1) Society of American Archivists, *Code of Ethics*, http://www2.archivists.org/statements/saa-core-values-statement-and-code-of-ethics#code_of_ethics; (2) American Library Association, *Questions and Answers on Privacy and Confidentiality*, http://www.ala.org/Template.cfm?Section=interpretations&Template=/ContentManagement/ContentDisplay.cfm&ContentID=34114; (3) ALA, *Code of Ethics of the American Library Association*, 3, http://www.ala.org/advocacy/proethics/codeofethics/codeethics; (4) ALA, *Resolution on the Retention of Library Usage Records*, June 28, 2006, available at http://www.ala.org/offices/oif/statementspols/ifresolutions/libraryusagerecords (last visited March 20, 2012).

that an individual's privacy right in what he or she borrows from a library is "overwhelming," going on to state that that state's Attorney General sees "no public interest at all to put in the scales opposite the privacy rights of the individual." Office of the Attorney General of the State of Kentucky, OAG 81-159 (Apr. 21, 1981). In light of these well-settled norms, therefore, it is undeniable that researchers have at least a "de minimis" privacy interest in their research methods and inquiries. *Associated Press,* 554 F.3d at 285.[5]

That same privacy interest applies with full force to the former officials. Disclosing the special access requests would reveal the former officials' research methods and topics of inquiry, Robison Decl. ¶16, and would be contrary to the former officials' and their representatives' clear expectation that NARA will treat their special access requests as having been made in confidence. *Id.* ¶ 20. Moreover, there is simply no reason why a former president or vice president, after leaving office and returning to private life, should be deprived of privacy protections that other members of the general public are entitled to. While the PRA does grant the former officials greater access than that of the general public to the presidential records from

---

[5] Although Plaintiff protested what he perceived as NARA's inconsistency in deeming special access requests covered by Exemption 6 yet releasing FOIA requests that NARA had received seeking presidential records, *see* Compl. Ex. 3 at 1-2, this differing treatment is purely a function of FOIA case law holding that persons who submit FOIA requests do not ordinarily expect that their names will be kept private, and that, therefore, release of their names would not cause even the minimal invasion of privacy necessary to trigger the Exemption 6 balancing test. *See generally* Department of Justice Office of Information Policy FOIA Update, Vol. VI, No. 1 (1981), at 6 (advising agencies that "as a general rule" identities of FOIA requesters cannot "be withheld under the FOIA") (available at http://www.justice.gov/oip/foia_updates/Vol_VI_1/page4.htm (last visited March 23, 2012)) (citing *Stauss v. IRS*, 516 F. Supp. 1218, 1223 (D.D.C. 1981), and *National Western Life Insurance Co. v. United States*, 512 F. Supp. 454, 460-61 (N.D. Tex. 1980)); *see also Holland v. CIA*, No. 91-1233, 1992 WL 233820, at *15-16 (D.D.C. Aug. 31, 1992) (researcher who sought assistance of presidential advisor in obtaining CIA files he had requested is comparable to FOIA requester whose identity is not protected by Exemption 6).

their administration, nothing about that statutory provision reflects an intent to *lessen* the privacy protections afforded a former President compared to other researchers. *See* 44 U.S.C. § 2205(3). To the contrary, the PRA's overall history reflects an intent to afford significant protections to a former President's personal privacy, as well as his pursuits of First Amendment freedoms. *See* H.R. REP. NO. 95-1487, pt. 1, at 5-7 (1978), reprinted in 1978 U.S.C.C.A.N. 5732, 5737-38 [hereinafter *House Report*] (discussing the history of the PRMPA, and former President Nixon's challenge to that PRA-predecessor law based on personal privacy and First Amendment grounds); *id.* at 7 (noting that "compelled disclosure in itself can seriously infringe on privacy and belief guaranteed by the first amendment"); *id.* at 11 (noting the need "to properly protect a President's privacy interests and his first amendment associational rights"). In light of the PRA's evident sensitivity for a former President's privacy rights, it would be anomalous if the general public's inquiries were protected under FOIA, but a former President's inquiries were not.

Even beyond the compelling generally-applicable privacy rights held by researchers and other members of the public, additional considerations merit, if anything, even greater privacy protections for the former officials' inquiries. For one thing, robust privacy protections are necessary to fulfill one of the PRA's purposes – to encourage former Presidents to conduct research of their historical papers in service of writing about their experiences as President. Specifically, the PRA's legislative history reflects a view that the public benefits from presidential memoirs, and that former Presidents should have unrestricted access to their presidential papers to encourage and facilitate their preparation of memoirs. *See, e.g.*, *To Amend the Freedom of Information Act to Insure Public Access to the Official Papers of the President, and for Other Purposes: Hearings Before the Subcomm. on Gov't Information and Individual*

Rights of the H. Comm. on Gov't Operations, 95th Cong. 72 (1978) [hereinafter *House Hearings*] (statement of Rep. Kirkendall, at 256) ("a former President should be encouraged to write a memoir by having early access to the Presidential records of his term"); *see also id.* at 253 ("Just as Congress should not throw open all materials immediately, it should not pass rules that would discourage public figures from writing memoirs[.]"); *The Disposition and Preservation of Documents of Federal Officials: Hearing on H.R. 16902 and Related Legislation Before the Subcomm. on Printing of the H. Comm. on H. Admin.*, 93rd Cong. 77 (1974) (statement of John Eisenhower) (testifying regarding the PRMPA, a PRA-predecessor statute, and stating: "An additional factor that enters my thinking is that I feel a President has a certain obligation to write his memoirs. This has been done by every President who survived office since Hoover. In order to write such memoirs effectively, he should have selected Presidential papers available for reference."). Again, immediate public disclosure of a former President's research topics would almost certainly tend to discourage the former President from researching or writing his memoirs — contrary to one of the purposes of the PRA.

Moreover, the PRA must be viewed within its historical context. Without the PRA's passage, each President would have been free to consult his papers at will, and could do so privately without any public knowledge of whatever he chose to peruse, whether for scholarly purposes or any other reason. In passing the PRA, Congress articulated no intent to deprive former Presidents of that ability, and so, notwithstanding the PRA's passage and the resulting need of the former officials to submit "special access requests" to peruse their former papers, that should still be the case. *Cf. Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) ("When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear."). Indeed, the PRA's legislative history actually states that the

Archives should process presidential records in the same manner as the Archives was doing prior to the PRA. *See House Report* at 15 ("It is anticipated that the Archivist will process the former administration's papers in a manner roughly similar to current practices."). Thus, all evidence from the PRA indicates that, consistent with pre-PRA practice, former Presidents should be able to consult their presidential records without having their inquiries publicly disclosed.

At bottom, the former officials possess a substantial privacy interest in the subject of their inquiries, as confirmed by the near-universal norms within the archival and librarian professions. Moreover, the PRA itself was designed to encourage former Presidents to seek information from their presidential papers. It would be anomalous, therefore, if the PRA actually *curtailed* those privacy rights and discouraged a former President from conducting such research, by exposing the former Presidents' inquiries to the general public through FOIA – a result that could not have occurred prior to the PRA's passage.

E. Any Public Interest in Disclosure Does Not Outweigh the Former Officials' Privacy Interest in the Materials Sought

The former officials' substantial privacy interest in the requested information vastly outweighs the public interest (if any) in disclosure of the information sought here. *See Associated Press,* 554 F.3d at 291 ("'Only where a privacy interest is implicated does the public interest for which the information will serve become relevant and require a balancing of competing interests.'") (quoting *FLRA,* 958 F.2d at 509). To secure disclosure, the "requesting party bears the burden of establishing that disclosure of personal information would serve a public interest cognizable under FOIA." *See Associated Press,* 549 F.3d at 66 (citing *Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157, 172 (2004)). The "only relevant public interest in disclosure to be weighed in this balance is the extent to which [the] disclosure would serve the core purpose of the FOIA, which is contribut[ing] significantly to public understanding

of the operations or activities of the government." *U.S. Dep't of Defense v. FLRA,* 510 U.S. 487, 495 (1994) (quoting *Reporters Comm.,* 489 U.S. at 775) (quotation marks omitted) (emphasis in original); *accord Bibles v. Oregon Natural Desert Ass'n,* 519 U.S. 355, 355-56 (1997) (per curiam). FOIA's purpose is not furthered by disclosure of information that "reveals little or nothing about an agency's own conduct." *Reporters Comm.,* 489 U.S. at 773.

Here, plaintiff cannot show any appreciable public interest in disclosing the former officials' requests for materials. Any curiosity about this subject is not a public interest cognizable under FOIA, because the former officials' inquiries necessarily shed no light on the current functioning of the Government. Indeed, plaintiff's own complaint confirms that he is not interested in these materials for the purpose of understanding governmental operations. Rather, plaintiff is seeking these materials to better understand the *private* activities of former President Bush and former Vice President Cheney: "Mr. Cook seeks these records in order to gain insight into the way in which the former President and Vice President have chosen to shape the public's perception of their time in office, and to provide this insight to the public through online news stories." Compl. at ¶ 5. That purpose says nothing whatsoever about the current operation of the Government, and thus plaintiff cannot prove any cognizable public interest. Because plaintiff has not shown any public interest whatsoever, NARA has properly withheld the materials pursuant to Exemption 6. *See Horner*, 879 F.2d at 879 (holding that when plaintiff has shown no public interest, courts "need not linger over the balance; something, even a modest privacy interest, outweighs nothing every time").

Plaintiff cannot overcome this failure to articulate a public interest by arguing that the former officials' requests somehow indirectly will reveal something of value concerning governmental operations. Arguments based on indirect or collateral benefits of disclosure are

legally insufficient, and, instead, disclosure is deemed not in the public interest unless there is a direct connection between the information and governmental operations. *See Hopkins,* 929 F.2d at 88 ("[W]e find that disclosure of information affecting privacy interests is permissible only if the information reveals something *directly* about the character of a government agency or official.") (emphasis in original) (citing *Reporters Comm.,* 489 U.S. at 774); *accord Associated Press,* 554 F.3d at 288; *Horner,* 879 F.2d at 879 ("[U]nless the public would learn something directly about the workings of the *Government* by knowing the names and addresses [of the people for whom the Government possesses information], their disclosure is not affected with the public interest.") (emphasis in original); *Hertzberg v. Veneman,* 273 F. Supp. 2d 67, 87 (D.D.C. 2003) (finding disclosure "not compelled under the FOIA because the link between the request and the potential illumination of agency action [was] too attenuated").

Here, even if there were a public interest in whatever policy-oriented information could be gleaned from the fact that the former officials sought or obtained certain information from their official records, the indirect means that plaintiff would be using to obtain that information and the entirely speculative nature of any argument that disclosure would serve that end are insufficient to meet plaintiff's burden to justify a disclosure here. *See Associated Press*, 554 F.3d at 290 (in case where requester argued that disclosure of names of Guantanamo detainees would permit assessment of possible varying treatment of individual detainees or types of detainees, "the speculative nature of the result is insufficient to outweigh the detainees' privacy interest in nondisclosure"). That interest would be more than outweighed by the former officials' privacy interest in not having the nature of their inquiries and their private thought processes revealed for popular consumption against their clear wishes. *See U.S. Dep't of State v.*

Ray, 502 U.S. 164, 179 (1991) ("Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy.").

One other factor further supports the conclusion that the former officials' privacy interest in their special access requests outweighs any possible public interest supporting disclosure. By passing the PRA and simultaneously affording the former officials access to presidential records while barring any public requests for those records for at least five years, Congress already has made its own determination of how to balance the former officials' privacy interests and the public interest in whatever those presidential records contain. *See* 44 U.S.C. § 2204. Congress determined that the public would generally have to wait at least five years before learning what presidential records contain, and also determined that, during (as well as after) that five-year period, the former officials would have an unlimited opportunity to use those materials however they saw fit, likely in part to work on memoirs that would broadly benefit the public. Thus, Congress itself already has determined that, whatever public interest may exist in presidential papers of former administrations, FOIA and the public interests that it serves do not justify release of such information during the initial years that the former officials have left office. *See id.*

As shown above, mere curiosity about what information private citizens seek is not a cognizable public interest under FOIA, which serves to illuminate *government* conduct or decision-making. And, in addition to being insufficient under cases such as *Hopkins* and *Horner*, *supra*, any argument that the information plaintiff seeks may somehow shed light governance or governmental policies would be contrary to a balancing of private and public interests that Congress has already performed. The Court should not authorize such an end run around this clear statutory determination. *Cf. Wis. Project on Nuclear Arms Control v. U.S.*

Dep't of Commerce, 317 F.3d 275, 283-85 (D.C. Cir. 2003) (FOIA did not require disclosure of material protected by executive order, in light of "comprehensive legislative scheme as a whole").

For the foregoing reasons, the former officials' privacy interests outweigh any possible public interest in disclosure of the formal officials' requests to NARA and NARA's responses. The materials at issue therefore are exempt from disclosure under FOIA Exemption 6.

CONCLUSION

The Court should award summary judgment in favor of NARA.

Dated: New York, New York
March 26, 2012

Respectfully submitted,

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for Defendant

By: /s/ David S. Jones
DAVID S. JONES
Assistant United States Attorney
86 Chambers Street
New York, New York 10007
Tel. [redacted]
Fax [redacted]
[redacted]@usdoj.gov